in Section 149. Under Section 139 the first default and first period are excluded from on demand charges and the demand in writing takes the place of the formal notice Schedule XXIX and creates the default mentioned in Section 149. In either case the default upon which Section 149 is invoked must continue for one month before application is made.

L. T. Williams in reply.

Gerahty J., delivered oral judgment as in the Head Note.

(Original Civil Jurisdiction)

Thorne, Ag. C. J.

November 25, 1932.

YAP PIANG.....Plaintiff

v.

WONG LEE NAM.....Defendant

(Selangor Civil Suit No. 362 of 1932)

Civil Procedure Code, 1918, *Section* 492—*Arrest before judgment—Action for damages—Malice—Reasonable and probable cause—Termination of proceedings.*

An action for damages for alleged wrongful arrest before judgment, under Section 492 of the Civil Procedure Code, is analogous to an action for damages for malicious prosecution, and it is essential for the plaintiff to establish malice and the absence of reasonable and probable cause.

Where the person arrested furnishes security and is released, the proceedings on the warrant of arrest terminate as soon as the security has been furnished, and accordingly it is not a condition precedent in an action for damages for the alleged wrongful arrest to establish that the order for the issue of the warrant of arrest has been set aside.

The Hon. Mr. S. Veerasamy for the Plaintiff.

S. M. Sharma for the Defendant.

The facts and arguments appear sufficiently from the judgment.

Cur. adv. vult.

Thorne, Ag. C. J.:— In this case the plaintiff sues the defendant for damages in the following circumstances. On the 4th day of June 1932, defendant brought a suit in the Magistrate's Court, Tapah, numbered 143/32, against the plaintiff to recover the sum of $216-89. On the same day he procured from the Magistrate an order for the arrest of the defendant before judgment. The plaintiff alleges that this order was obtained by the defendant on allegations which were false.

In pursuance of this order a warrant was issued from the Magistrate's Court, Tapah, under which the plaintiff was arrested at Puchong in the State of Selangor on the 11th day of June 1932, and on furnishing security to the police at Sungei Besi, was released.

Plaintiff alleges that the defendant's action was malicious, and was without reasonable and probable cause, and in consequence the plaintiff has suffered damage, and claims $1000/- general damages.

The defendant admits that he sued the plaintiff in the Magistrate's Court, Tapah, and that he applied for an order for the arrest of the plaintiff before judgment. He denies that the allegations made by him in support of this application were false, or that he acted maliciously and without reasonable and probable cause. He avers that he had reasonable cause for his action, and says that the proceeding in the Magistrate's Court, Tapah, resulted in judgment in his favour for the amount of the claim and costs.

By further defence the defendant contends that the order of the Magistrate, Tapah, for the issue of a warrant to arrest the plaintiff, not having been cancelled or discharged, the plaintiff here now has no cause of action against him.

The case was called on before me on the 3rd of November. Mr. Veerasamy for the plaintiff put in the following documents:—

1. the plaint in the Magistrate's Civil Suit No. 143/32;
2. the affidavit of the defendant which led to the issue of a warrant of arrest before judgment; and
3. the warrant issued under this order.

Mr. Sharma for the defendant then put in the notes made by the Magistrate, Tapah, in Civil Suit No. 143/32, and took as a preliminary objection the point raised by his further defence, and by arrangement, this was argued as a preliminary point. Mr. Sharma contended that in an action such as this to recover damages for the abuse of the ordinary civil process of the Court, the same principles of law are to be applied as in the case of an action for damages for malicious prosecution, except as to possibly the character or quantum of damages. He submitted that malice and the absence of reasonable and probable cause must be proved, as well as the fact that the proceeding determined in favour of the plaintiff.

He pointed out that in this case the order of the Magistrate, directing the warrant to issue, had not been set aside, and accordingly the plaintiff could not establish that the proceeding had been determined in his favour.

Mr. Veerasamy agreed that this action was akin to an action for damages for malicious prosecution and, as I understood him, conceded that it was essential for the plaintiff to establish both that the defendant acted maliciously, and had no reasonable and probable cause for the action which he took. But he said that in an action such as this the plaintiff cannot be put to proof of the favourable determination of the proceedings of which he complains.

I agree with counsel that this action is analogous to an action for damages for malicious prosecution, and that it is essential for the plaintiff to establish

malice and the absence of reasonable and probable cause. The only question then I have to consider is whether it is necessary for the plaintiff in this case to establish the favourable determination of the proceeding of which he complained.

It seems to me that in this class of case much depends upon the nature of the proceedings of which the plaintiff complains. For example, the wrongful presentation of a petition in bankruptcy against the debtor, or a petition to wind up a trading company, may give rise to such action as the present; and I apprehend in that case it would be necessary to establish that the petition had been dismissed or otherwise disposed of before the commencement of the action for damages. See *Quartz Hill Consolidated Mining Company* v. *Eyre* (1883) 11 Q.B.D. 674. But there are a number of cases in which it would be impossible for the plaintiff to establish that the proceedings determined in his favour.

For example:—

The malicious arrest of a ship—see *Walter D. Wallet*, (1893) P. 202

The malicious issue of an extent—see *Craig* v. *Hasell*, (1843) 4 Q.B. 481; 114 E.R. 980

The malicious registering a judgment—see *Gibbs* v. *Pike*, (1842) 12 L. J. Ex. 257; 152 E.R. 149

and The registration of a document as a bill of sale see—*Horsley* v. *Style* (1893) 69 L.T. 222.

It is to be remembered here that the proceeding is not the suit itself which admittedly resulted in judgment adverse to the present plaintiff. The proceeding we are considering is that which resulted in the issue of a warrant for the arrest of the plaintiff before judgment.

This proceeding issues under section 492 of the Civil Procedure Code, upon an *ex parte* application of the plaintiff; and under the proviso to that section, if the defendant in the action pays to the officer of the Court the sum specified in the warrant as sufficient to satisfy the plaintiff's claim, no further proceedings are had on the application. In this case the plaintiff did not pay the amount but furnished security.

When the suit came on for hearing in the Magistrate's Court, the plaintiff after the judgment in that suit, could have applied to the Magistrate under section 504 of the Civil Procedure Code, and if he had done so. the question of the propriety of the issue of the warrant would have been raised; but the defendant would have been bound by the award of the Magistrate, since under sub-section (ii) of that section, such an award is a bar to any other suit.

In my view, the plaintiff was not bound to apply to the Magistrate to set aside this order either before or after judgment as a preliminary to the present suit.

To my mind there are practical difficulties in the way of such an application. In the first place the Magistrate might well have declined to entertain such an application until the hearing of the suit, and in view of the terms of section 504, would have declined to make any order upon such an application until the hearing. At the hearing the defendant admitted the plaintiff's claim, whereupon judgment was entered for the plaintiff in that suit. If then an application had been made under section 504 of the Civil Procedure Code, the plaintiff would have been faced with the difficulty I have mentioned. Section 504 too suggests that a defendant against whom such an order has been made has an alternative remedy.

In the next place, assuming that the Magistrate had entertained such an application, the plaintiff would have been called upon to establish a negative, which is always a difficult matter.

Lastly, the plaintiff might not have regarded the Court of the Magistrate, who made the order for the issue of the warrant, as a particularly favourable tribunal to consider the propriety or otherwise of that order.

In my view, in the events which happened in this case, the proceedings by way of a warrant for the arrest of the plaintiff came to an end as soon as he had furnished security, and in the circumstances to which I have referred, the proceedings could not determine in favour of the plaintiff in the manner in which a prosecution in a criminal case is determined.

I am of the opinion that it is not incumbent upon the plaintiff in this suit to establish that the order for the issue of a warrant for his arrest had been set aside as a condition precedent to his present action, and the preliminary objection fails.

(NOTE:—We are informed that an appeal has been filed against the above decision. Ed:)

(Appellate Criminal Jurisdiction)

Thorne, Ag. C. J.

November 8, 1932.

PUBLIC PROSECUTOR.....Appellant

v.

CHOOI YEW CHOR.....Respondent

(Perak Magistrate's Criminal Appeal No. 68 of 1932)

Tin and Tin-ore Restriction Enactment, 1931, *Rule* 21 *(ii)—Construction of Rule.*

The words "which has been subjected to any process of concentration" in Rule 21 (ii) of the rules made under the Tin and Tin-ore Restriction Enactment, 1931, should not be construed as referring only to tin-ore which has been dressed or cleaned, but should receive a wider interpretation, bearing in mind that so soon as tin-bearing earth has been separated from earth which does not bear tin, the first step in the process to concentrate has commenced.

Raja Musa, Deputy Public Prosecutor, for the Appellant.

G. Terrell for the Respondent.

The facts appear sufficiently from the judgment.

Cur. ad. Vult.